NO. 12903

United States
Court of Appeals
For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY,
a corporation,

Appellant,

vs.

GEORGE M. MELTON,

Appellee.

Brief of Appellant

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I. JURISDICTION

This case was brought by appellee, a citizen resident of the State of Montana, in the United States District Court for the District of Montana against appellant, a Minnesota corporation, for damages suffered by a shipment of sheep over appellant's line of railroad from Kevin, Montana to Wickes, Montana (Tr. pp. 3, 11, 18, 19). The matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00 (Tr. pp. 3-11). The jurisdiction of the United States District Court is thereby established pursuant to the provisions of Section 1332 of Title 28, U.S.C.A.

II. STATEMENT OF THE CASE

On May 30, 1949, appellee, the owner of a band of sheep consisting of 1010 ewes, 920 lambs and 74 bucks, loaded said sheep into eight stock cars of appellant Railway Company. The sheep were to be transported by appellant over its line of railroad and delivered to appellee at Wickes, Montana. Said shipment of sheep departed from said Kevin, Montana on May 30, 1949, and was thereafter, and on May 31, 1949, delivered by appellant to appellee at said Wickes, Montana (Tr. pp. 19, 109, 127 Exs. 6, 7). Thereafter a suit for damages was brought by appellee against appellant alleging that appellee suffered damage arising out of said shipment in the sum of $4,051.00. The basis of this claim for damages was alleged to be the failure of appellant to perform its duty in the prem-

ises and to carelessly and negligently handle said shipment of sheep (Tr. p. 4). As a result of this alleged negligence of appellant, it is alleged that the sheep became bruised, injured, trampled and suffocated, as a consequence of which 58 ewes died, 149 lambs died, 170 ewes became sick and unable to nurse their lambs and 154 lambs became motherless (Tr. pp. 4 and 5). The sheep were valued at $28.00 per pair, a "pair" being a ewe and a lamb (Tr. pp. 59, 89). Freight charges in the sum of $600.00 were paid by appellee to appellant to cover the cost of this shipment.

Appellant answered by way of a general denial and also asserted, as an affirmative defense, the provisions of the Uniform Livestock Contract entered into between the parties (Tr. pp. 10-17) the particular provisions considered applicable being Sec. 1(a) and Sec. 1(b) dealing with exempting the carrier from liability unless caused by its own negligence for damage to livestock resulting from an act of God, inherent vice, weakness, or natural propensity of the animal, over-loading, crowding, suffocation, fright, heat or cold, or changes in weather; and Sec. 4, providing that the shipper at his own risk shall load and unload the livestock (Tr. pp. 13, 14). Appellant in its answer further alleged that the sheep had been driven in rain prior to loading at Kevin, that said shipment was wet when loaded, that the ewes and lambs lost the scent of each other as a result of being wet, that said sheep were not properly mothered when loaded, and

that appellee insisted on loading the sheep, although wet and without proper sorting. Further, appellant alleged that appellee was present and in charge of loading operations and assumed the risk of loading the sheep in a wet condition, and that said sheep were transported through rain during their journey and that appellee knew the possible effect of rain upon the shipment, which is an ordinary risk of shipping livestock. Further, appellant alleged that the livestock cars furnished were the standard cars, properly sanded for use by sheep and that as a result of the wet sheep being loaded and the rain occurring thereafter, the sand, manure and water mixed in the cars to form a mass with which said sheep became covered without the fault of appellant (Tr. pp. 10-17). The case was thereafter tried to the Court without a jury, resulting in a judgment for appellee (Tr. p. 25).

III. SPECIFICATIONS OF ERROR

Specification of Error No. 1

The Court erred in finding that there was no consideration for the special contract limiting defendant's statutory liability (Tr. p. 184).

Specification of Error No. 2

The Court erred in finding that defendant accepted said sheep for carriage over its line as being in apparent good shape and fit to travel over said line to Wickes, Montana (Tr. p. 184).

Specification of Error No. 3

The Court erred in finding that defendant had weather information available to it and knew, or could have known, in the exercise of reasonable care, that more rain and wet conditions were to be expected at the time of shipment (Tr. p. 184).

Specification of Error No. 4

The Court erred in finding that said sheep were all jammed up in the north end of each and every railroad car (Tr. pp. 184, 185).

Specification of Error No. 5

The Court erred in finding that defendant was negligent in accepting for carriage and in transporting to Wickes, Montana, the said shipment of sheep when it knew, or in the exercise of reasonable care, should have known, that it might rain on said sheep during the course of transportation to Wickes, Montana, and that damage to said sheep as a result of such additional rain would occur (Tr. p. 185).

Specification of Error No. 6

The Court erred in finding that defendant was negligent in not properly caring for said sheep or properly inspecting said sheep to determine their condition after they were rained upon during the course of transportation from Kevin, Montana to Wickes, Montana (Tr. p. 185).

Specification of Error No. 7

The Court erred in finding that the damage to the sheep did not occur as a result of any inherent defect, vice, weakness or spontaneous action of the property itself and that the damage caused was not a result of any irresistible superhuman cause (Tr. p. 185).

Specification of Error No. 8

The Court erred in finding that the damage to said sheep was directly proximately caused by defendant's negligent acts and omissions and that such negligent acts and omissions were the proximate cause of plaintiff's loss (Tr. p. 185).

Specification of Error No. 9

The Court erred in finding that at the time of delivery and loading of said freight, said livestock was in good condition (Tr. p. 185).

Specification of Error No. 10

The Court erred in finding that said livestock had no greater value than $20,000.00 by reason of the negligent manner in which the defendant transported the same (Tr. p. 185).

Specification of Error No. 11

The Court erred in finding that plaintiff sustained loss or damage by reason of defendant's negligence in the sum of $4,051.00, or in any other sum (Tr. p. 185-6).

Specification of Error No. 12

The Court erred in failing to find that the transportation of said sheep by plaintiff from Kevin, Montana to Wickes, Montana, was subject to the provisions of the Uniform Livestock Contracts entered into between plaintiff and defendant prior to the commencement of the transportation of said sheep and that said contracts were in full force and effect at the time of shipment of said sheep and during the course of the transportation thereof (Tr. p. 186).

Specification of Error No. 13

The Court erred in failing to find that the provisions of said contracts, to-wit, Section 1(a) and (b) and Section 4(a) were in full force and effect and that the plaintiff was bound thereby (Tr. p. 186).

Specification of Error No. 14

The Court erred in failing to find that it is inherent in the nature of sheep, when wet and muddy, to lose their scent of each other, resulting in ewes and lambs being unable to identify each other (Tr. p.186).

Specification of Error No. 15

The Court erred in failing to find that plaintiff was in sole charge of, and responsible for the loading of said sheep at Kevin, Montana, and was liable for any risk incident to loading said sheep in the condition then and there existing, or in the manner or

method of loading (Tr. p. 186).

Specification of Error No. 16

The Court erred in failing to find that no evidence of negligence on the part of the defendant was proved by plaintiff, either as charged in his complaint or otherwise (Tr. p. 186).

Specification of Error No. 17

The Court erred in failing to find that the damage suffered by plaintiff to his said shipment of sheep was a result of the inherent vice, weakness and natural propensity of the sheep themselves, the change of weather to which said shipment of sheep was subjected and the climatic conditions of the heat and cold existing during the course of transportation and these were risks assumed by plaintiff for which defendant was not liable or responsible, being relieved of liability therefor by reason of the provisions of the Uniform Livestock Contracts governing said shipment of sheep (Tr. p. 187).

Specification of Error No. 18

The Court erred in concluding that the special contract between defendant and plaintiff purporting to relieve defendant of its statutory liability is invalid and not binding upon plaintiff for the reason that there is no consideration for such a special contract (Tr. p. 187).

Specification of Error No. 19

The Court erred in concluding that the defendant is liable for the damages to said sheep under provisions of Section 8-812, R.C.M. 1947 (Tr. p. 187).

Specification of Error No. 20

The Court erred in concluding that the defendant is liable for the loss suffered by plaintiff for the reason that the defendant's negligent acts and omissions proximately caused the plaintiff's loss (Tr. p. 187).

Specification of Error No. 21

The Court erred in concluding that the plaintiff is entitled to judgment against the defendant in the sum of $4,051.00 (or any other sum) together with interest thereon at the rate of 6% from June 29, 1949, until paid and for his costs of suit (Tr. 188).

Specification of Error No. 22

The Court erred in not concluding that defendant was not negligent as charged in plaintiff's complaint or otherwise (Tr. p. 188).

Specification of Error No. 23

The Court erred in not concluding that plaintiff is bound by the terms of the Uniform Livestock Contracts entered into between plaintiff and defendant (Tr. p. 188).

Specification of Error No. 24

The Court erred in not concluding that plaintiff's damage was the result of the inherent vice, weakness and natural propensity of the sheep themselves, the change of weather to which said sheep was subjected and the climatic conditions of heat and cold existing during the course of the transportation which were risks assumed by plaintiff (Tr. p. 188).

Specification of Error No. 25

The Court erred in not concluding that plaintiff is not entitled to recover from defendant in any sum.

Specification of Error No. 26

The Court erred in entering a judgment for plaintiff against the defendant in the sum of $4,051.00, principal (or in any other sum) and for interest in the sum of $382.14 (or in any other sum) and in taxing costs against the defendant in the sum of $67.72 (or in any other sum) (Tr. p. 188).

IV. ARGUMENT

The principal contentions made by appellee in this appeal are: (1) (a) that the evidence in the case did not sustain the Findings and Conclusions of the lower Court that the appellant was negligent in accepting the appellee's sheep for carriage, that the appellant was negligent in caring for said sheep, (1) (b) that the damage to said sheep was not the result of any

inherent defect, vice or weakness of said sheep and that appellant's negligence was the proximate cause of the damage, (2) and that the contract between appellee and appellant was not a valid and binding contract and that appellant was liable under the provisions of Section 8-812, R.C.M. 1947.

(1)(a) *Evidence Does Not Sustain Findings of Negligence.* Specifications of Error numbered 2, 3, 4, 5, 6, 8, 9, 10, 11, 16, 19, 20, 21, 22, 26.

The District Court in its Findings (V, VI, Tr. pp. 21, 23) has found the appellant to be negligent in accepting for carriage and transporting appellee's sheep. The appellant introduced in evidence the record of the complete movement of the shipment of sheep during the time it had custody of said sheep. That movement was shown by appellant's witnesses to be as follows:

The shipment departed from Kevin, Montana on May 30, 1949, at 3:50 P. M.; arrived at Shelby, Montana on May 30, 1949 at 4:45 P. M.; departed from Shelby at 6:30 P. M. May 30th and arrived at Great Falls at 12:45 a. m., May 31st, 1949; departed from Great Falls at 4:55 A. M., May 31st and arrived at Wickes at approximately 10:30 A. M. on May 31st (Tr. pp. 125, 126, 127, 129, defendant's Exhibits 6 and 7)—a distance of 242.6 miles (Exs. 6, 7).

Appellant produced as witnesses each one of the conductors in charge of the trains that moved these sheep and each one of the conductors produced, and

there was introduced in evidence, his delay report covering the record of the movement of which he was in charge (defendant's Exhibits 8, 9, 11, 13).

Conductor Veach was in charge of the train moving the sheep from Kevin to Shelby (Tr. p. 136). There was no rough handling or any sudden stop during this portion of the journey and no switching was performed with the sheep. (Tr. p. 139). The sheep were connected next to the engine (Tr. p. 140) and were inspected at Shelby (Tr. p. 140) where nothing was found wrong with the sheep (Tr. p. 140).

Conductor Larson was in charge of the train carrying the sheep from Shelby to Great Falls (Tr. p. 142). During this portion of the journey there was no rough handling or any sudden stop (Tr. p. 146) and no switching was performed with the sheep (Tr. p. 145). Again the sheep were transported next to the engine (Tr. p. 147). This train was inspected at Shelby (Tr. p. 145), at Conrad (Tr. p. 144) and at Vaughan (Tr. p. 147) and no irregularities were noted (Tr. p. 147).

Conductor Marceau was in charge of the train from Great Falls to Wickes (Tr. p. 148). During this portion of the journey the sheep were placed within seven cars of the head end of the train (Tr. p. 149). There was no rough handling or any sudden stop during this movement (Tr. p. 154). This train was inspected at Cascade, Wolf Creek, and Helena (Tr. pp. 150, 151). Nothing was found wrong with the shipment during these inspections (Tr. pp. 150 and 151). The

train arrived at Wickes at 10:30 A. M. on May 31, 1951 (Tr. p. 129).

Brakeman Lukasik performed inspections of the train between Great Falls and Wickes and found the sheep to appear normal (Tr. pp. 158 and 159).

After arrival of the train at Wickes, the 8 loads of sheep were placed on the stockyard spur (Tr. p. 152) by the train moving the sheep from Great Falls to Wickes.

Conductor Ewinski in charge of the local train which arrived at Wickes at 11:50 A. M., May 31, 1949, unloaded the sheep (Tr. pp. 161, 162, 163). One car had been unloaded prior to the arrival of this local train (Tr. p. 163). The unloading of the remaining 7 cars was accomplished within 45 to 50 minutes (Tr. p. 163).

At the time of unloading these sheep at Wickes, there were only 3 lambs, 3 ewes and 1 or 2 bucks, dead (Tr. pp. 59, 104). Such a death loss was not considered abnormal for such a shipment (Tr. p. 87).

The evidence is conclusive that these sheep were wet upon arrival at their destination, Wickes, Montana (Tr. pp. 71, 107, 164). There is a conflict in the testimony as to whether or not the sheep were wet when loaded; however, the District Court has found that the sheep had been subjected to rain and muddy conditions prior to loading, but that appellee judged said sheep had dried sufficiently so that they could be safely loaded and transported (Tr. pp. 21, 22). The cars furnished for this shipment are shown to have

been standard cars, sanded and in condition for use (Tr. p. 116). During the course of the movement of this shipment, this shipment of sheep was rained upon and became wet (Finding V, Tr. p. 22, Defendant's Ex. 14, Tr. p. 179). As shown by the evidence submitted by appellant, there was no negligent handling of this shipment, nor any negligent delay in transporting the sheep. Appellee contends that there was a delay in unloading the sheep at Wickes, awaiting the arrival of the local train (Tr. p. 47). There is no evidence, however, that this delay was unreasonable or that it contributed in any way to the damage suffered by the sheep, and the lower Court in its Findings did not find that there was any negligent delay in unloading at Wickes (Tr. pp. 18 to 25).

The loading of the sheep was under the control of appellee. He was the judge as to whether or not it was safe to make the shipment (Tr. p. 62). Appellee and his witness, Thomas, who assisted with the loading of the sheep, both stated that they considered the sheep had become sufficiently dry so that it would be safe to load and ship them (Tr. pp. 63, 64, 89, 94).

Appellant, however, was found by the lower Court to have been negligent in accepting the sheep for carriage (Tr. p. 23). We submit that the evidence does not justify any such Finding and that it is not possible to say that appellant did not exercise ordinary care in accepting this shipment when appellee and his witness, Thomas, both experienced sheep men, con-

sidered that it was safe to load the sheep on the stock cars.

The Court further found that it was negligent of appellant not to have known that it might rain on the sheep during the course of their transportation (Tr. p. 23). We submit that such finding is in error and places a burden upon the carrier far beyond the requirements of reasonably prudent action. The appellant was obligated to accept this shipment unless it knew, or could reasonably anticipate that it could not discharge its obligation of transporting the sheep from Kevin to Wickes. It did not fail in its obligation of transportng the sheep, but made delivery expeditiously to appellee at Wickes.

The universal rule as to the liability of a common carrier of livestock is stated in 13 C.J.S., page 155, Sec. 79b:

> "A carrier is not an insurer of live stock delivered to it for transportation, for it does not absolutely warrant such freight against the consequences of its own vitality, and if there is loss or injury due to the peculiar nature and propensities of the animals, the carrier is not liable, unless the loss or injury could have been prevented by the exercise of reasonable foresight, vigilance, and care on its part. The carrier is relieved from liability from such causes, if he has provided suitable means of transportation and exercised that degree of care which the nature of the property requires, or has not otherwise contributed to the injury. *This rule prevails at common law and no special contract limiting the carrier's liability in respect to injuries re-*

sulting to animals from such causes is necessary." (Italics ours).

Sec. 8-702, R.C.M. 1947, provides as follows:

"*Obligation to accept freight.* A common carrier must, if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry."

See: 9 Am. Jur. Sec. 292, p. 611.

The case of Wahle, et al. vs. G. N. Ry. Co. (1910) 41 Mont. 326, 109 Pac. 713, involved a question of whether or not a carrier was negligent in accepting a shipment when it did not have, or could reasonably anticipate that it would not have, facilities to discharge its obligation. In that case the Montana Court held the defendant liable because it failed to prove that at the time of its acceptance of the shipment that it could not, by the use of ordinary care, have known or anticipated that it could not discharge the obligation assumed. In that case, however, the evidence established conclusively that the carrier knew of the existence of an abnormal condition. Severe floods had caused damage to the rail line which had not been completely repaired, heavy rains were threatening portions of the line and causing damage. Another rail carrier in the same territory had already been forced to discontinue part of its operations. In the case presented by this appeal, there is no evidence or any suggestion made of any such abnormal condition which would justify appellant in refusing to accept appellee's shipment of sheep.

Although the District Court found that appellant had weather information available to it, and knew, or could have known, in the exercise of reasonable care, that more rain and wet conditions were to be expected, (Tr. p. 22) we submit that there is no evidence in this record to support such a finding. There is not even a suggestion made as to the probable weather conditions which would exist during the course of the transportation. There is evidence in the record, by the statements of witnesses and by documentary proof, as to what the weather conditions actually were during the time this shipment was being moved by appellant (Tr. pp. 67, 89, Exhibits Nos. 6, 7, 14). Appellant introduced by its Exhibit 14 (Tr. p. 179) a weather chart for Montana prepared by the United States Weather Bureau, covering the dates May 30th and May 31st, 1949. This exhibit was not, however, a weather prediction for those dates. The rain through which this shipment passed was not abnormal in any respect. It was a normal spring rain and certainly not of such severity to justify appellant refusing to render transportation service. The possible weather conditions were as well known and as available to appellee as to appellant. And appellee considered the conditions proper to load and transport the sheep (Tr. pp. 41, 63, 64). We therefore contend that there is no evidence to justify finding appellant negligent on the basis that it accepted said sheep when it knew that it might rain during the course of their transportation. To so hold, in effect makes appellant respon-

sible for each and every rain storm through which it may be transporting sheep, and further makes it responsible for knowing what weather conditions shall be during the course of transportation of a shipment of sheep. It seems to us that the Court's Findings and Conclusions (Tr. pp. 22-24) *are in effect holding that appellant was negligent because on May 30th and 31st, 1949, it rained in a portion of the State of Montana.*

(1) (b) *Damage to Sheep Was the Result of the Inherent Defect of the Animal.* Specifications of Error Numbered 7, 14, 17, 19, 24, 26.

It is the contention of appellant that the District Court erred in its Finding (VII, Tr. p. 23) to the effect that the damage to the sheep was not a result of any inherent defect, vice, weakness or spontaneous action of the sheep themselves. This wording is taken from Sec. 8-812, R.C.M. 1947.

The evidence on this particular point, we feel, establishes conclusively that when sheep become wet and muddy or dirty, it will cause them to lose their scent of each other, resulting in ewes being unable to recognize their lambs. Such a circumstance is one of the natural weaknesses of the sheep, an inherent defect or vice for which a carrier is not responsible.

The lower Court found that the sheep involved had been wet prior to loading but that appellee judged said sheep to have dried sufficiently that they could be loaded and transported (Tr. pp. 21-22). The Court

did not find that the sheep were dry when loaded and although there is a conflict in the evidence as to whether or not they were dry, the evidence is to the effect that these sheep were at least damp (Tr. p. 62). There is a danger incident to loading wet sheep, as stated by appellee, his witness, Thomas, and the veterinarian Nordell (Tr. pp. 62, 95 and 174). Appellee delayed loading the sheep at Kevin because he was concerned that it might rain on them (Tr. pp. 64, 181). During their journey the sheep became wet by reason of rain through which they passed (Tr. p 22). As a result of the sheep becoming wet and muddy from the cars, their scent of each other was lost. This, we contend, is established by the evidence as being a natural weakness, vice, propensity and inherent defect of the animal. Appellee so testified (Tr. pp. 50, 62, 78, 87). The veterinarian Nordell so testified (Tr. p. 175). Sheep are peculiar and stupid animals (Tr. pp. 73, 173) and are easily subject to fright (Tr. p. 174) which is also an inherent weakness of a sheep (Tr. p. 175). Sheep which have become wet during shipment will develop some stiffness (Tr. p. 173) and wet sheep will jam up and are cold (Tr. p. 95).

These results, however, are not due to any negligence on the part of a carrier but are, we submit, an inherent weakness of the animal. The damages incurred here resulted from one cause only—the sheep were wet or became wet. After becoming wet, damage resulted, not from negligence or act of the carrier—but from the inherent weakness of that sheep;

a condition for which the carrier is not liable.

Section 8-812, R.C.M. 1947, provides as follows:

> "*Liability of inland carriers for loss.* Unless the consignor accompanies the freight and retains exclusive control thereof, an inland common carrier of property is liable, from the time that he accepts until he relieves himself from liability, pursuant to sections 8-414 to 8-417, for the loss or injury thereof from any cause whatever, except:
>
> 1. An inherent defect, vice, weakness, or a spontaneous action of the property itself;
> 2. The act of a public enemy of the United States, or of this state;
> 3. The act of the law; or,
> 4. An irresistible superhuman cause."

This section of the Montana statutes is a statement of the common law rule. There have been few cases in Montana interpreting this section.

In the case of Nelson vs. Great Northern Ry. Co. (1903) 28 Mont. 297, 72 Pac. 642, the Montana Court recognized the common law rule that if sheep, while being transported, died or were injured from some inherent want of vitality, or by reason of injuries inflicted upon each other, or by an unavoidable accident, the carrier would not be liable.

It has long been settled that a carrier is not responsible for damage to livestock by reason of its inherent nature or infirmity or propensities. And it is also generally held that a carrier is not responsible for damage to livestock resulting from changing weather conditions.

The reason for such a rule is stated in Jordan v.

Chicago, Burlington & Quincy R. Co. (Mo.) 1920, 226 S. W. 1023, at page 1027:

> "Now, a carrier is not liable for the bad condition of live stock at the end of a journey, unless such bad condition is the result of some negligence on the part of the carrier. As a necessary and natural incident to a long journey, live stock become 'weak, dauncy, hungry and lank'. They are the natural results of long trips in cold and snowy weather, even where there is no negligence either of delay or in handling. And for such results, in the absence of negligence, the carrier is not liable. 10 C. J. 122. Neither is it liable for loss or injury on account of a mere want of vitality, sickness, restlessness, or vicious propensities of live stock. 10 C.J. 123, 124; Cunningham v. Wabash R. Co., 167 Mo. App. 273, 282, 149 S. W. 1151; Jackson v. Chicago, etc., R. Co., 34 S. D. 153, 147 N. W. 732, 733."

See 13 C.J.S. Sec. 79b at page 155, supra, page 14.

The general rule is stated in 13 C.J.S., Sec. 79, at page 158, as follows:

> "A carrier of live stock is not liable for injuries caused by changing weather conditions. In the absence of some negligence or misfeasance on the part of the carrier or its servants, the carrier is not liable for loss or injury to animals occasioned by excessive heat or cold. This is a risk assumed by the shipper."

Coupland v. Housatonic R. Co. (Conn.) 1892, 23 Atl. 871-872:

> "The common-law rule which made carriers practically insurers of property while being carried by them has, however, from the very necessity of the case, been in a measure relaxed in the carriage of livestock. As suggested in Edw.

Bailm. Sec. 680, the carrier can store away goods, so as to secure their safety; but a carrier of animals by a mode of conveyance opposed to their habits and instincts has no such means of securing absolute safety. They may die of fright; they may, notwithstanding every precaution, destroy themselves in attempting to break away from the fastenings by which they are secured; or they may kill each other by crowding, plunging, or goring; the motion of the cars, their frequent concussions, the scream of the engines may often create a kind of frenzy in the swaying mass of cattle; and the carrier is not held liable for injuries or losses arising from the irrepressible instincts of this living freight which he could not prevent by the exercise of reasonable care."

Bragg v. Payne (Mo.) 1921, 235 S. W. 148:

"This shipment, it must be remembered, was one of live stock, and under the common-law rule, if the property transported was damaged by reason of its inherent nature or infirmity, and without fault on the part of the carrier, the latter was not liable, all of which is peculiarly applicable to live stock because of their vitality, natural infirmities and inherent propensities."

See also:

9 Am. Jur. Sec. 747, p. 880.

Cleve vs. Chicago, Burlington & Quincy R. Co. (Neb.) 1909, 120 N.W. 959.

Winn v. American Express Company (Iowa) 1913, 140 N.W. 427.

Washington Horse Exchange v. Louisville & N. R. Co. (N.C.) 1916, 87 S. E. 941.

Under the early Montana decisions the burden was placed upon the carrier to establish by a preponderance of the evidence that death or injury to live stock

was occasioned by some cause other than the carrier's negligence. (Nelson v. G.N.Ry. Co. (1903) 28 Mont. 297, 72 Pac. 642; Wahle, et al v. G.N.Ry. Co. (1910), 41 Mont. 326, 109 Pac. 713). In the case presented by this appeal, we feel that such a preponderance of evidence has been established as shown by the evidence heretofore referred to.

Nevertheless we think it advisable to call the Court's attention to the more recent cases from other jurisdictions which have modified that rule. One of the leading cases on this particular point is:

> Southern Pac. Co. v. Itule (Ariz.) 1937, 74 Pac. (2d) 38, p. 40:
>
> "The appeal raises a question of law in regard to the extent of the liability of a carrier for perishable articles, such as fruit and vegetables, which has never been determined in this jurisdiction. Under the common law, every carrier receiving goods in good condition for carriage, and delivering them in bad condition, was presumed to have been negligent in their transportation, and was liable for the damages caused by its negligence. There were four, and only four, defenses which might be raised by the carrier under such circumstances, these being that the injury was caused by (a) an act of God, (b) the public enemy, (c) the act of the shipper, or (d) the inherent nature of the goods themselves. It is sometimes said that the basis of the carrier's liability for the loss or damage to goods in transit was presumed negligence, but this, strictly speaking, is erroneous, since it cannot be rebutted. The rule is really one of substantive law, to the effect that the carrier is an insurer of the safe transportation of goods entrusted to its

care, unless the loss or damage is due to one of the four specified causes (citing cases). Since these four defenses are affirmative ones, the burden of proof was on the carrier to show that the injury was caused in one of these four manners, and in the absence of affirmative and satisfactory evidence to that effect, following the rule in all cases where the burden of proof is with one or the other party on a given issue, it was the duty of the trial court to instruct the jury that the carrier had not met the burden imposed on it. The older cases are very strict in regard to the necessity of the carrier establishing affirmatively the true cause of the injury, if it desired to escape liability. There was, however, even then, one apparent exception to this rule, and that was when the goods transported were livestock. It was held that, due to the peculiar nature and propensity of animals, the carrier should not be liable for injury thereto, if it had provided suitable means of transportation and exercised the degree of care which the nature of the property required, and had not otherwise contributed to the injury. According to the weight of authority in such cases, therefore, it was generally held that, if the carrier showed that it had provided the proper means of transportation and had exercised that degree of care in transporting the property which its nature requires, it did not need to go further and make a specific showing that the injury was actually caused by one of the four reasons allowed as a defense to the action. 10 C. J. p. 123, and cases cited.

"We think this apparent exception to the general rule is, in reality, only a recognition of the different quantum of evidence required to establish the same defense under different circumstances. It is a well-known fact that the majority

of inanimate objects, when they are delivered to the carrier in good condition, will almost invariably remain in the same state until they reach the consignee at the end of the route, in the absence of some human instrumentality which injures them. Such being the case, it is but reasonable that, in case such objects arrived in a damaged condition, the carrier should prove affirmatively the damage was caused by one of the four things above set forth, since they were the only matters which released it from the obligation of an insurer imposed on it by public policy. For instance, a plate glass mirror, which is in good condition, will remain so indefinitely unless injured by an act of God or some human violence applied thereto directly or indirectly. And, since the carrier is in the exclusive possession of the goods during their carriage, it is in the best position of any one to show affirmative the real cause of the damage. It is apparent, however, that animate objects, such as livestock, are in an entirely different category. They may be injured, or even killed, by acts arising out of their own inherent nature and unaccompanied by any human agency or negligence. Even with the best of care on the part of all who come in contact with them during the shipment, they often fail to arrive at their destination in good condition. *The apparent exception is merely a recognition of this fact, and, if the carrier proves the exercise of due care on its part, the natural presumption is that the damage was caused by the nature of the animals, and not by any human agency.*" (pp. 40-41).

The Texas Court in Panhandle & S. F. Ry. Co. v. Wilson (1939), 135 S.W. (2d) 1062, stated:

"Whatever may be the present status of the rule of law which makes a common carrier an

insurer of goods received by it for transportation, and regardless of what the rule may be with reference to the exceptions in case of shipments of livestock, it is well established law in this state that when the presumption of negligence arises it devolves upon the carrier to show by testimony there was no negligence on its part in connection with the shipment. When the plaintiff establishes the presumption by showing a delivery of the livestock to the carrier; that they were in good condition when delivered, and that they were received at their destination in a damaged condition, the plaintiff has made a prima facie case and shifted to the carrier the burden of exonerating itself from negligence (citing cases).

"If the testimony stops there and the carrier adduces no evidence of the manner in which the shipment was handled by it, the plaintiff is entitled to recover. But the rule is equally as well established that, when the case reaches that stage and the burden is thus shifted to the carrier, it adduces legal evidence of the manner in which the shipment was handled and shows by competent evidence that nothing was done or allowed to happen during the time it had possession of the property that could be classed as negligence, it exonerates itself from liability and thus discharges the burden so placed upon it. The prima facie case made by the plaintiff is then destroyed and the duty devolves upon him to proceed further and establish the case made by his pleadings by showing in some manner that the injury and damage resulted from the carrier's negligence."

To the same effect, see Illinois Central R. Co. vs. Rouw & Company (Tenn.) 1940, 159 S. W. (2) 839.

Appellant here maintains that in a case such as the one here presented where the carrier has exer-

cised all proper care and foresight it may be reasonably required to exercise, it would be most unreasonable to charge him with the loss suffered when there is no evidence whatsoever of negligence and the carrier has established that the cause of the loss resulted from an inherent weakness of an animal (in this case a sheep) after they had become wet from an ordinary Spring rain.

2. *Validity of Contract.* Specifications of Error numbered 1, 12, 13, 15, 18, 23, 25, 26.

At the time appellee delivered the shipment of sheep to appellant at Kevin, Montana on May 30, 1949, the parties entered into contracts covering the carriage of these animals. Those contracts (known as Uniform Livestock Contracts) were introduced in evidence by appellee as his Exhibits Nos. 1 and 2 (Tr. p. 44). There is no question about the execution and delivery of the contracts. The two contracts were identical in terms and each contained the following provisions:

> "Sec. 1(a). Except in the case of its negligence proximately contributing thereto, no carrier or party in possession of all or any of the livestock herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, the inherent vice, weakness, or natural propensity of the animal, or the act or default of the shipper or owner, or the agent of either, or by riots, strikes, stoppages of labor or threatened violence.
>
> "(b) Unless caused by the negligence of the carrier or its employees, no carrier shall be liable

for or on account of any injury or death sustained by said livestock occasioned by any of the following causes: Overloading, crowding one upon upon another, escaping from cars, pens or vessels, kicking or goring or otherwise injuring themselves or each other, suffocation, fright, or fire caused by the shipper or the shipper's agent, heat or cold, changes in weather or delay caused by stress of weather or damage to or obstruction of track or other causes beyond the carrier's control.

"Sec. 4(a). The shipper at his own risk and expense shall load and unload the livestock into and out of cars, except in those instances where this duty is made obligatory upon the carrier by statute or is assumed by a lawful tariff provision. * * *"

The lower Court by its Conclusion No. II (Tr. p. 24) decided that the special contract between the parties here purporting to relieve the appellant of its statutory liability was invalid and not binding upon appellee for the reason that there was no consideration for such special contract.

The Court in its Finding No. IV (Tr. p. 21) found that the $600.00 freight charges paid by appellee to appellant was the ordinary and usual rate for this shipment and that there was no consideration for the special contract limiting appellant's statutory liability.

Section 8-707, R.C.M. 1947, provides as follows:

> "*Obligations of carrier altered only by agreement.* The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract."

The Montana Court has upheld the right of a carrier to make a special contract.

Nelson v. G. N. Ry. Co., 28 Mont. 297, 72 Pac. 642;

Rose v. Northern Pacific, 35 Mont. 70, 88 Pac. 767.

The Uniform Livestock Contract form used for this shipment is one which has been in use for many years. The form was prepared to conform to the provisions of Title 20, U.S.C.A., Sec. 20 (11). There is no attempt by the carrier to relieve itself from the consequences of its own negligences, and the District Court has so found (Tr. p. 21). There is no assertion made that the contract is void because of unreasonableness, it being held invalid on one ground only—that there was no consideration.

The consideration for this contract was the $600.00 freight charge paid by appellee to appellant. The basis of rates upon which that charge was made was computed for transportation *under the terms of this contract. The* $600.00 *freight charge was the rate to be paid for shipment with the provisions in the contract limiting the liability of the appellant.*

Appellee introduced these contracts in evidence (Tr. p. 44). Appellee introduced no evidence concerning lack of consideration for the contracts. Appellee apparently considered the terms of the contracts as binding, as evidenced by his efforts to show that the sheep were in "apparent good order" as stated in the contracts (Tr. p. 45).

The Montana Court decided this question in 1907. In Rose v. Northern Pacific Railway Co., 35 Mont. 70,

88 Pac. 767, the Court had for decision the question of consideration for a special contract under the Montana law. The exact question was whether or not a passenger ticket stating that it was sold at a reduced rate was sufficient consideration for limiting the carrier's liability for baggage carried. The Court there said.

> "This ticket constituted a contract between the Northern Pacific Railway Company and Mrs. Rose for the transportation of herself and her baggage from Butte to Omaha. (6 Cyc. 570). It must be conceded that the reduced price at which the ticket was sold is sufficient consideration for any contract which the company might lawfully make respecting the transportation of the passenger or her baggage. It is not necessary that there should have been a special or independent consideration for every separate paragraph or provision of the contract, for the consideration of the contract itself is a consideration for every provision in it. In other words, the ticket containing these 11 provisions, with the introductory clause quoted above, constitutes one entire contract. In Cau v. Texas & Pacific Ry. Co., 194 U.S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053, it is said: 'It is again urged that there was no independent consideration for the exemption expressed in the bill of lading. This point was made in York Co. v. Central Railroad, 3 Wall. (U.S.) 107, 18 L. Ed. 170. In response it was said: "The second position is answered by the fact that there is no evidence that a consideration was not given for the stipulation. The company, probably, had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the exception of losses by fire must neces-

sarily have affected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made." *In other words, the consideration expressed in the bill of lading was sufficient to support its stipulations.*'

But it is said that the recital that the ticket was sold at a reduced rate was only prima facie evidence of the fact, and therefore the court should not have excluded the testimony offered. *It is sufficient answer to say that no effort was made to show that in fact the ticket was not sold at a reduced rate.*"

And at page 769, the Court further stated:

"But it is contended that Mrs. Rose was not aware of the terms of paragraph 8 of the ticket, as set forth above, and that in any event she should have been accorded the opportunity to determine for herself whether she would accept this ticket with its limitation as to the value of her baggage or procure another kind of ticket by which she might have held the carrier for its full value. We do not think there is any merit in either of these contentions. The limitation mentioned in paragraph 8 was made by a plain provision on the face of the ticket, and the ticket was signed by Mrs. Rose. *In the absence of fraud, a party to a written contract cannot be heard to say that he did not know or understand its contents.* In Cau v. Texas & Pacific Ry. Co., above, it is said: 'There can be no limitation of liability without the assent of the shipper (New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. (U.S.) 344, 12 L. Ed. 465); and there can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law (Railroad Co. v. Lockwood, 17 Wall. (U.S.) 357, 21 L. Ed. 627; Bank of Kentucky v. Adams Express Co., 93 U.S. 174, 23 L. Ed. 872). Inside

of that limitation, the carrier may modify his responsibility by special contract with a shipper. *A bill of lading limiting liability constitutes such a contract, and knowledge of the contents by the shipper will be presumed.*' See, also, Section 2204 of the Civil Code.

The second contention is likewise disposed of by the decision in the Cau case. It is said: 'It is well settled that the carrier may limit his common-law liability. York Co. v. Central Railroad, 3 Wall. (U.S.) 107, 18 L. Ed. 170. But it is urged that the contract must be upon a consideration other than the mere transportation of the property, and an "option and opportunity must be given to the shipper to select under which (the common-law or limited liability) he will ship his goods." If this means that a carrier must take no advantage of the shipper or practice no deceit upon him, we agree. If it means that the alternative must be actually presented to the shipper by the carrier, we cannot agree. From the standpoint of the law the relation between carrier and shipper is simple. Primarily the carrier's responsibility is that expressed in the common law, and the shipper may insist upon the responsibility. *But he may consent to a limitation of it, and this is the "option and opportunity" which is offered to him*'."

The United States Supreme Court cases upon which the Rose case, supra, is based, are:

Cau v. Texas, etc., Ry. Company, 194 U.S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053;

York Manufg. Co. v. Ill. Cent. R. R. Co., 3 Wall. 107, 18 L. Ed. 170.

In the York case, the United States Supreme Court said at page 172:

"The owner of the goods may rely upon this responsibility imposed by the common law, which

can only be restricted and qualified when he expressly stipulates for the restriction and qualification. But when such stipulation is made, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement.

We do not understand that the counsel of the plaintiff in error questions that the law is as we have stated it to be. His positions are that the agents of the plaintiff at Memphis, who made the contract with the Illinois Central Railroad Company, were not authorized to stipulate for any limitation of responsibility on the part of that Company; and that no consideration was given for the stipulation made.

The first of these positions is answered by the fact that it nowhere appears that the agents disclosed their agency when contracting for the transportation of the cotton. So far as the defendant could see, they were themselves the owners.

The second position is answered by the fact, that there is no evidence that a consideration was not given for the stipulation. The Company, probably, had rates of charges proportioned to the risks they assumed from the nature of the goods carried; and the exception of losses by fire must necessarily have affected the compensation demanded. *Be this as it may, the consideration expressed was sufficient to support the entire contract made.*

In the Cau case, the Court had this exact question under consideration. The Court there said at page 1056:

"It is well settled that the carrier may limit his common-law liability. York Mfg. Co. v. Illinois C. R. Co., 3 Wall. 107, 18 L. Ed. 170. But it

is urged that the contract must be upon a consideration other than the mere transportation of the property, and an 'option and opportunity must be given to the shipper to select under which, the common-law or limited liability, he will ship his goods.'

"If this means that a carrier must take no advantage of the shipper, or practice no deceit upon him, we agree. If it means that the alternative must be actually presented to the shipper by the carrier, we cannot agree. From the standpoint of the law the relation between carrier and shipper is simple. Primarily the carrier's responsibility is that expressed in the common law, and the shipper may insist upon the responsibility. But he may consent to a limitation of it, and this is the 'option and opportunity' which is offered to him. What other can be necessary? There can be no limitation of liability without the assent of the shipper (New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. Ed. 465), and there can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law (citing cases).

Inside of that limitation, the carrier may modify his responsibility by special contract with a shipper. A bill of lading limiting liability constitutes such a contract, and knowledge of the contents by the shipper will be presumed.

It is again urged that there was no independent consideration for the exemption expressed in the bill of lading. This point was made in *York Mfg. Co. v. Illinois C. R. Co.*, 3 *Wall.* 107, 18 *L. Ed.* 170. In response it was said: 'The second position is answered by the fact that there is no evidence that a consideration was not given for the stipulation. The company, probably, had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the

exception of losses by fire must necessarily have affected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made.'

In other words, the consideration expressed in the bill of lading was sufficient to support its stipulations. This effect is not averted by showing that the defendant had only one rate. It was the rate also of all other roads, and presumably it was adopted and offered to shippers in view of the limitation of the common-law liability of the roads."

The same Court also stated in Hart v. Pennsylvania R. R. Co., 112 U.S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, at page 720:

"It must be presumed, from the terms of the bill of lading and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that, as the rate of freight expressed is stated to be on the condition that the defendant assumes a liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation."

Applying the rules as set forth in the authorities immediately preceding, we submit that there can be no question but that the consideration set forth in the contracts and paid was a sufficient consideration to support the contracts, and that they were valid.

If the cause of appellee's damage was the natural weakness of the animals, as heretofore contended, the question of whether or not the livestock shipping contracts are valid, is immaterial. Under the Montana Statutes, Sec. 8-812, supra, and the common law as shown by the citations, supra, the carrier is relieved

from liability from such cause.

The contracts, in addition, however, by Sec. 1(b) thereof, supra, also relieve appellant from liability for damages caused by overloading, crowding, injuring themselves and each other, suffocation, fright, heat or cold, and changes in the weather. We contend that appellee is bound by the terms of those contracts and if changes in the weather, or heat or cold, caused the damage to the sheep, then appellant is not liable therefor. We have previously in this brief set forth in detail the evidence regarding the weather conditions and will not repeat them here. This evidence seems to us to be conclusive in establishing that the damage to these sheep resulted from a rain storm, a change in weather, and we submit that for such cause appellant is not liable. We have previously set forth on page 20 of this brief the authorities in support of our contention. The carrier is not liable for damage caused by changing weather conditions.

Further, the contracts provide, Sec. 4(a) supra, that the shipper shall load and unload the livestock unless the statutes or tariffs provide otherwise. There is no statute in Montana making it obligatory that appellant perform the loading. Nor has that function been assumed under a tariff. Therefore, appellant was solely responsible for loading these sheep *and he did so at his own risk.* He was an experienced sheep man and it has been found that he "judged" that it was safe to load and transport these sheep (Tr. p. 22). If, as a result of loading the sheep, when wet or damp,

or other unsafe condition, they suffered damage, the carrier cannot be held liable therefor.

Appellee relied on the contracts (Exhibits 1 and 2, Tr. p. 44) apparently, for appellee assumed that the appellant was bound thereby by making the point during the course of the trial that upon the face of the contract it was stated the livestock was received in apparent good order (Tr. pp. 45, 121).

A bill of lading acknowledging the receipt of an article in good order is not conclusive evidence as to condition. (9 Am. Jur., Sec. 422, page 679).

CONCLUSION

Appellant believes that it is not liable for the damage suffered by appellee in this case and that the District Court erred in so finding and concluding and entering Judgment in favor of appellee. This belief of appellant is based on three grounds: First, that there was no negligence proven by appellee against appellant and that appellant proved by a preponderance of the evidence that it was free from negligence; second, that the damage suffered by appellee was due to an inherent weakness and vice of sheep, a condition for which appellant is not liable; and, third, that under the provisions of a valid contract between appellant and appellee, appellant was relieved from liability for damage caused by changing weather conditions, heat or cold, or other conditions over which appellant had no control.

Respectfully submitted,
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